

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. **77-1184**

ANTHONY J. PERLONGO,

Petitioner,

v.

THE UNITED STATES,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

JOHN I. HEISE, JR.

861 Pershing Drive
Silver Spring, Maryland 20910
(301) 585-8400

Attorney for Petitioner

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner respectfully petitions that a Writ of Certiorari issue to the United States Court of Claims to review its Order entered November 25, 1977 granting the Respondent's Motion for Summary Judgment.

OPINION BELOW

The Opinion by the Three-Judge Panel of the Court of Claims and the Order granting the Respondent's Motion for Summary Judgment is printed in Appendix A, *infra*.

JURISDICTION

The Order of the Court of Claims was entered on November 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and the Rules of the Supreme Court of the United States Rule 19(1)(b) and 2.

QUESTIONS PRESENTED

1. Was the Petitioner, a federal probationary employee, entitled to a hearing on whether his termination was effected after full and fair evaluation in accord with Civil Service Regulations in view of his allegations that he was not given the true reasons for his termination?
2. Did the Court of Claims err in granting the Respondent's Motion for Summary Judgment when the Petitioner's affidavits and other documents specifically raised unresolved factual issues material to the outcome of the case?

STATUTES AND REGULATIONS INVOLVED

United States Constitution, First Amendment
 United States Constitution, Fifth Amendment
 5 C.F.R., Section 314.803 (1975)
 5 C.F.R., Section 315.804 (1975)
 Federal Personnel Manual, Chapter 315, Subchapter 8-3, (1974)
 Federal Personnel Manual, Chapter 315, Subchapter 8-4, (1975)

STATEMENT OF THE CASE

This case involves the involuntary termination of a probationary trainee from the Drug Enforcement Administration of the Department of Justice. At the time of his termination, the Petitioner was a Criminal Investigator (Special Agent Trainee) GS-1811-7.

The Petitioner, an honorably discharged veteran, was a long-time city and state government employee who, not only was highly educated in sociology and criminology, but had served as an investigator with the Office of the New York Attorney General for eight years. When the Petitioner joined the Drug Enforcement Agency (DEA), Department of Justice, in September 1975, he started the basic ten-week training program at the National Training Institute in Washington, D.C.

The training program began on September 8, 1975 and was to be concluded on November 14, 1975 with graduation. During the training program the Petitioner was reported as progressing satisfactorily and at no time was he ever advised that his progress was less than satisfactory. His objective test scores were adequate.

At the end of six weeks of training, on or about October 18, 1975 the Petitioner observed, during the course of a field exercise, (and subsequently reported), that his senior class advisor was drinking an alcoholic beverage while on duty on government property and in a semi-intoxicated condition. On this occasion the Petitioner reported that he also was verbally abused by this advisor who made threats concerning the Petitioner's evaluation and ability to complete the training program. After being directed to make a written report to the Chief of the Basic Program Section, the Petitioner filed his report of the incident on October

23, 1975. No one discussed the report with the Petitioner. The senior class advisor was subsequently suspended by the agency for three days for drinking while on duty on government property.

Less than one week later, on or about October 29, 1975 the instructors of the Petitioner's Basic Agent Training Class voted to recommend that the Petitioner be terminated from the class. Although the vote of the instructors was eight to one to terminate the Petitioner, several of the instructors who voted did not know the Petitioner by personal contact; so their knowledge was limited to that which was discussed in the meeting. One of the individuals who participated in the discussion of terminating the Petitioner, and who voted to terminate the Petitioner, was the senior class advisor reported by the Petitioner for drinking while on duty. The Petitioner was not aware of any meetings or discussions until the Respondent filed its Motion for Summary Judgment in the U.S. Court of Claims.

On November 11, 1975 the Petitioner was given verbal notification of his termination. On November 13, 1975, the New York Regional Director of DEA issued a notice of separation to the Petitioner, effective November 18, 1975, stating that the notice was issued based on reports by Washington, D.C. training officials of Petitioner's alleged unsatisfactory conduct and performance.

Petitioner filed an appeal with the Civil Service Commission on December 1, 1975. The Federal Employee Appeals Authority of the Civil Service Commission (FEAA) declined the Petitioner's appeal as not being within the purview of the FEAA's jurisdiction, stated its decision was final, and that Petitioner had no further rights of administrative appeal.

On June 14, 1976, Petitioner filed a petition in the Court of Claims. Petitioner alleged that his termination by DEA

was not based on an honest consideration and full and fair trial of his work performance and conduct, but rather was effected as a result of his reporting the senior class advisor. The Petitioner asserted that he has been stigmatized by the Respondents' actions and was therefore entitled to Due Process protection.

A Three-Judge Panel of the Court of Claims filed an Order on November 25, 1977 granting the Respondent's Motion for Summary Judgment and dismissed the petition. From that Order the Petitioner is hereby filing this petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This case involves an important question which addresses the standard of judicial review to be used when individuals are dismissed from federal employment during their probationary period. In the present matter, Petitioner alleged that he was not given the "true" reasons for his termination, nor a full and fair evaluation of his job performance as required by Civil Service regulations. The Court of Claims erred in dismissing the matter on a Motion for Summary Judgment. The Order was in conflict with the requirements of the Court's rules and prior decisions in not affording the plaintiff an opportunity for a trial.

Rule 101 of the Court of Claims Rules states that Summary Judgment "shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In *Wilson v. United States*, 203 Ct. Cl. 676, 492 F.2d 1190 (1974), the Court of Claims noted that "this court has in the past required the parties to sub-

mit factual issues to the fact finder, despite the fact that the case appeared on Cross Motions for Summary Judgment." In *Joseph Horne Co. v. United States*, 133 Ct. Cl. 270, 135 F. Supp. 549 (1955), the Court of Claims stated that a Motion for Summary Judgment can not be sustained when there is a genuine issue as to a material fact, and movant has the burden of showing that there is no such genuine issue.

The unresolved material fact of this case is whether the decision of the DEA to terminate the Petitioner was based on an honest and fair evaluation of Petitioner's performance after a full and fair trial and whether he was given the "true" reasons for his separation. The Petitioner has never been given a hearing on his charge that the reason for his dismissal was in retaliation for reporting one of his instructors. The Court of Claims in *Greenway v. United States*, 163 Ct. Cl. 72 (1963) stated:

"... Nevertheless, where an employee, probationary or otherwise, is by regulation or statute protected in that he is entitled to honest consideration based on the merits, but it is charged that the action of the responsible personnel official or officials was instead arbitrary, capricious, or maliciously motivated, a different situation is presented." 163 Ct. Cl. 72 at 81.

The Petitioner at all stages of this case has alleged that his dismissal was maliciously motivated. The record presented to the Court of Claims showed no unsatisfactory evaluations prior to the time he reported the senior class advisor for drinking on duty. The examples given by several of the instructors as reasons for voting for his dismissal occurred at times subsequent to their vote at a faculty meeting to terminate the Petitioner.

While the Respondent and the Court of Claims note that the Petitioner made unsupported and slanderous charges against his instructor and used this allegation to support his dismissal, at no time has the Petitioner been given an opportunity to support his charges against his instructor. Indeed, the Court of Claims concluded that the charges made by the Petitioner, were unsupported. However, Petitioner was never afforded an opportunity, either administratively or judicially, to provide testimony or evidence in support of his allegations.

The Court of Claims in *Swaaley v. United States* 180 Ct. Cl. 1, 376 F.2d 857 (1967) held that the burden on the employee charged with making defamatory statements was not to prove the truth of his statements but the burden was on the employing agency or the Civil Service Commission to show that the statement was willfully false or made with reckless disregard of its truth or falsity. The Court stated:

"The conclusion follows that plaintiff's involuntary separation was not made according to law in that the sole cause of dismissal was a petition to the Secretary of the Navy for redress of grievances, containing a statement defamatory to a public official but not shown to be willfully false or made with reckless disregard of its truth or falsity." 180 Ct. Cl., at 19.

Even though the Petitioner here is a probationary employee, in the interest of fairness to the employee and as part of an evaluation of their training personnel, the DEA should at least allow the Petitioner an opportunity to support his allegations against the senior class advisor if DEA and the Courts are going to use the Petitioner's memorandum as the basis for supporting the dismissal. The Court

of Claims in its Order granting Summary Judgment to the Respondent uses the charges placed by the Petitioner as evidence of the Petitioner's inability to observe and report events. This observation, however, goes to the truth or falsity of the matters asserted. While the Court of Claims refers to the Petitioner's allegations in his memorandum as a "barrage of unsupported and slanderous charges," it should be noted that some of the reports filed by career agents against the Petitioner definitely take on the aspect of a "barrage of unsupported and slanderous charges" when viewed from the Petitioner's side.

In granting the Respondent's Motion for Summary Judgment the Court of Claims relied on *Horne v. United States*, 190 Ct. Cl. 145, 419 F.2d 416 (1969), that substantively, the only limitation on an agency's power to dismiss a probationary employee is that the agency must honestly be dissatisfied with the probationer's conduct or performance after giving him a fair trial at the job. In *Horne, supra*, however, the probationary employee was given a trial on the issue of whether she was accorded a full and fair evaluation prior to termination. In the present action the Petitioner's record was as good as many of the other trainees who graduated. The vote of dismissal and subsequent reports by DEA officials after the Petitioner's report of his instructor could be construed as either in good faith or retaliatory. The circumstances of Petitioner's allegations are sufficient to return the case to the Trial Division of the Court of Claims for a determination of whether the Petitioner received a full and fair evaluation or whether Respondent's actions in terminating the Petitioner were arbitrary and capricious. The Petitioner has not merely raised a naked, general denial of a Motion for Summary Judgment but brought up grounds sufficient to raise a genuine issue of material fact.

Before a Motion for Summary Judgment or for judgment on the pleadings can be granted, the right thereto must be clear and it must appear to a certainty that the plaintiff would not be entitled to relief under *any* stated facts which could be proved in support of his claim.

This Court in discussing the requirements in order for Summary Judgment to issue pursuant to the Federal Rules of Civil Procedure stated:

"... Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, ... [and where] no genuine issue remains for trial ... [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 88 L. Ed. 967, 972, 64 S. Ct. 724 (1944); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486, at 368 U.S. 468 (1962).

This Court in the same case also noted that the record must be reviewed in the light most favorable to the party opposing the motion. 368 U.S. at 473.

The Court of Claims has adopted a similar standard. In *Grover v. United States*, 200 Ct. Cl. 337 (1973) the Court of Claims stated:

"Plaintiff would seek to overcome the presumption of validity by raising the issue of arbitrary and capricious conduct and abuse of discretion by defendant, thus requiring a trial on the merits to establish whether plaintiff was really fired for reasons of malice. Such a contention is not ordinarily appropriate for resolution by summary judgment, absent a stipulation of the parties warranting disposition of the case on procedural grounds." 200 Ct. Cl. 337 at 343.

The Court of Claims has also fully discussed the use of affidavits in supporting motions for summary judgment.

"Plaintiff, in opposition to the Government's motion for summary judgment, says a question of fact exists based upon his counter affidavit which prevents the entering of a summary judgment. However, plaintiff's affidavit merely denies the truth of the facts set forth in defendant's affidavit and demands the right to cross examine. Upon the filing of affidavits by the defendant in support of a motion for summary judgment, the burden shifts to the plaintiff to present by affidavit facts contrary thereto or to show how he proposes to support any contrary allegations in the petition. In the absence of or inadequateness of counter affidavits by plaintiff, the court may accept as true the statements in defendant's affidavits. *Preveden v. Croatian Fraternal Union of America et al.*, 120 F. Supp. 33; *Holcomb v. United States*, 135 Ct. Cl. 612, 616; *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 10 FRD 566, 577. To hold otherwise would mean that any party could defeat a motion for summary judgment merely by filing

a counter affidavit denying the allegations contained in the affidavit filed in support of the motion for summary judgment." *Curtis v. United States*, 144 Ct. Cl. 194 at 199 (1958).

In the present action, Petitioner's affidavit was much more than a general denial of Respondent's allegation. Additionally, statements of Petitioner's affidavit were never denied by the Respondent officials. Petitioner's affidavit states that at no time was he told that he was performing at less than an acceptable level.

While the Petitioner's status as a probationary employee would make relief in the form of restoration of his position or award of back compensation difficult, the Petitioner does seek relief in clearing his name of the stigma attached to his dismissal. This relief could only be accomplished by a hearing on the Petitioner's allegation that his dismissal was maliciously motivated and that he was not given the "true" reasons for his termination.

The Petitioner raised the issue before the Court of Claims of the "Stigma" attached to the Petitioner by the Respondent's actions and is therefore entitled to Due Process Protections. The Petitioner is now 45 years old, a veteran who, after years of experience as a criminal investigator with the office of the New York Attorney General, has chosen the area of criminal investigation as a career. This court in *Codd v. Velger*, 429 U.S. 624, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977) and in *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972) has held that "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be

heard are essential." In *Board of Regents v. Roth, supra*, due process would have accorded an opportunity to repute the charges before University officials. In *Codd v. Velger, supra*, this Court stated:

"The purpose of this notice and hearing is to provide the person an opportunity to clear his name. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation."

The "stigma" in *Codd v. Velger, supra*, was characterized as information of a kind which would necessarily impair employment prospects for one seeking work as a police officer.

After being dismissed from the DEA Criminal Investigator (Special Agent Trainee) program the Petitioner was unable to obtain employment for a year. He still has not been able to obtain employment in his career area as a criminal investigator. He believes that this inability to obtain employment is directly related to the reasons the agency gave for his termination — "poor performance." It has stigmatized him in that it has deprived him of employment based on false and inaccurate reasons. Petitioner has never had an opportunity to refute the charges that led to his dismissal. Petitioner seeks a hearing on the reasons for his dismissal in order to clear his name and reputation according to the Fifth Amendment of the U.S. Constitution.

Petitioner seeks only a hearing on his allegations that he was not afforded a full and fair evaluation pursuant to the Federal Civil Service regulations and that he was not given

the true reasons for his termination. The Court of Claims under similar circumstances has so ordered in the past. In *Jackson v. United States*, 192 Ct. Cl. 765, 428 F.2d 844 (1970) the petitioner, a probationary employee, alleged that he was removed because he wrote a letter to an individual employed at the Office of Equal Opportunity criticizing his supervising officials. The Court in a detailed opinion discussed its opinion in *Swaaley v. United States, supra*, where allegedly "irresponsible statements" were made by the petitioner. The Court stated in *Jackson*:

"The BAR, it is true, did gratuitously go outside the issues before it to consider *Swaaley*, because plaintiff was urging it to do so. It said that that plaintiff could not invoke *Swaaley*, because he was a probationer. This is obviously incorrect: the constitutional protection of employees against removal because of petitioning for redress of grievance does not depend on the particular employee's status or tenure. Moreover, the BAR continued, plaintiff here, unlike in *Swaaley*, was not accused of making "unfounded" statements against agency officials. Of course, Mr. *Swaaley* did not enjoy First Amendment protection because he made unfounded statements, but in spite of it. If, however, the BAR means that an agency, incensed over an employee's petition for redress of grievances, may fire him without regard to the *Swaaley* precedent, simply by saying it is firing him for some other alleged reason, the statement is its own refutation.

Accordingly, we think it is incumbent on us to determine *de novo* whether the reason for plaintiff's firing was his letter to Mr. Miller, either by

itself or in association with other things. Defendant admitted in oral argument that the *Swaaley* precedent would govern if plaintiff should prevail on that issue. Plaintiff asserts, and defendant denies, that he was fired for that cause. Yet both sides urge that there is no dispute of material fact.

In view of the foregoing, and fully respecting the wish of the parties to have the case decided on the administrative record, we are unable to hold that there is no genuine issue of material fact, in view of the record, with respect to whether or not plaintiff was discharged as a reprisal for exercising his First Amendment right to petition for redress of grievances. This is the key fact issue in the case and before a decision is possible it must be resolved by trial. Therefore, both motions for summary judgment are denied and the case is remanded to the commissioner for further proceedings." 192 Ct. Cl. 765 at 772.

CONCLUSION

This court should accept this Petition for a Writ of Certiorari in order to right the wrongs which have been inflicted upon the Petitioner and to further clarify a probationary employee's right to an opportunity for a hearing when the reason for his dismissal is in issue.

Respectfully submitted,

By _____
 John I. Heise, Jr.
 861 Pershing Drive
 Silver Spring, Maryland 20910
 585-8400
Attorney for Petitioner

HEISE JORGENSEN & STEFANELLI, P.A.

APPENDIX A

[Filed Nov. 25, 1977]

IN THE UNITED STATES COURT OF CLAIMS

No. 240-76

ANTHONY J. PERLONGO)	Dismissal of probationary employee;
)	Standard of review is whether agency
v.)	action represents its honest judgment
THE UNITED STATES)	

Robert A. Hahn for plaintiff; *John I. Heise, Jr.*, attorney of record. *Sam Resnicoff*, of counsel.

Stephen G. Anderson, with whom was Assistant Attorney General *Barbara Allen Babcock*, for defendant.

Before NICHOLS, Judge, Presiding, LARAMORE, Senior Judge, and KASHIWA, Judge.

ORDER

This case is before this court on defendant's motion for summary judgment and plaintiff's cross motion for summary judgment. Plaintiff is seeking back pay, an order of reinstatement, and correction of his records to reflect continuous service. After consideration of the briefs and oral arguments, we hold plaintiff is not entitled to the relief requested.

Plaintiff, Anthony J. Perlongo, joined the Drug Enforcement Agency (hereinafter referred to as DEA) on Septem-

ber 2, 1975, as a special agent trainee under a career-conditional appointment. Plaintiff's employment was to be probationary for a period of one year. During the tenth week of the probationary period, plaintiff was terminated by the DEA for the following reasons:

On the basis of evaluations and appraisals of your conduct and performance while on duty during special agent training which began on September 8, 1975 it has been determined that you have not demonstrated character traits necessary for satisfactory performance as a Career employee. Staff officials of the Drug Enforcement Administration National Training Institute who have counselled you and observed and evaluated your conduct and performance have indicated that you have been uncooperative, argumentative, you lack self discipline and you are unable to accept constructive criticism. In addition, it was reported by training officials that you lack the ability to apply to realistic field training situations those principles and techniques which were taught in the academic portion of training such as inability to perform satisfactorily in a simple surveillance situation.

Plaintiff contends that the termination is both procedurally and substantively defective.

As a probationary employee, plaintiff is entitled to administrative review of his dismissal only to the extent provided by the regulations of the Civil Service Commission. The Lloyd-LaFollette Act, 5 U.S.C. §7501 (1970), does not apply to probationary employees because they are not members of the classified civil service. *Powers v. United States*, 169 Ct. Cl. 626, 629 (1965); *Day v. United States*, 143

Ct. Cl. 311 (1958). The Veterans Preference Act, 5 U.S.C. §7512 (1970), does not apply to probationary employees because they are expressly excluded from the definition of "preference eligible employees" to whom the act does apply. 5 U.S.C. §7511 (1970). Moreover, there are no regulations of the DEA which broaden the rights conferred by the Civil Service Commission in 5 C.F.R. §315.801 (1975) *et seq.* Accordingly, plaintiff may not contest his dismissal except to the extent that rights conferred by 5 C.F.R. §§315.801 (1975) *et seq.* were violated by the DEA. *Kaufman v. United States*, 207 Ct. Cl. 1005 (1975).

The rights conferred by Civil Service Commission regulations are very narrow. Procedurally, a probationary employee has the right only to be notified prior to termination of his employment as to the agency's "conclusions as to the inadequacies of [the probationer's] performance or conduct." 5 C.F.R. §315.804 (1975); *Horne v. United States*, 190 Ct. Cl. 145, 148, 419 F.2d 416, 418 (1969). Substantively, the only limitation on an agency's power to dismiss a probationary employee is that the agency must honestly be dissatisfied with the probationer's conduct or performance after giving him a fair trial at the job. *Horne v. United States*, *supra* at 150, 419 F.2d at 419; *Dargo v. United States*, 176 Ct. Cl. 1193, 1206 (1966).

Here, no procedural defect in effecting plaintiff's separation has been shown. The DEA officials clearly complied with the Civil Service regulation. Plaintiff was verbally notified by DEA officials of the reasons for his termination in an exit interview on November 12, 1975. Further notification was provided in a letter dated November 13, 1975, which also advised plaintiff of his appeal rights.

Substantively, plaintiff contends the stated reasons for his termination were not the true and correct reasons. Plain-

tiff maintains that the real reason for his termination was because he had reported one of his instructors for drinking while on duty. This caused a majority of the instructors to adopt a vindictive attitude toward him which eventually led them to recommend his termination.

In reviewing this substantive issue, our inquiry is whether DEA's action represents its honest judgment. Here, the record shows there is substantial evidence and a rational basis for the action taken by the DEA officials. Plaintiff's conduct in reporting instructor Rochon's drinking while on duty is only one of a number of incidents which brought plaintiff's character into question by the DEA officials. Further, plaintiff has alleged facts showing possible bias on the part of only one of the eight instructors who voted to terminate him. The other seven must be presumed to have acted in good faith in voting for his termination. *Knotts v. United States*, 128 Ct. Cl. 489, 121 F. Supp. 630 (1954). These seven would still constitute a majority of the instructors and would have led to the recommended termination of plaintiff. Also, the action of the supposedly biased instructors was only a recommendation to higher officials. Two higher officials had to review the recommendation of termination and act on it before plaintiff was terminated. Plaintiff alleges no bias on the part of the higher officials.

Finally, one of the required tasks of a narcotics agent is to observe actions and conduct and submit detailed, accurate reports thereon. Plaintiff's conduct in writing the October 23, 1975, memorandum attacking instructor Rochon's character with a barrage of unsupported and slanderous charges — that the instructor was an alcoholic, unworthy to be a special agent, one who took delight in criminally and sadistically abusing an informant — raises grave questions about his ability to dispassionately observe events and accurately report them to his superiors. Therefore,

IT IS ORDERED that plaintiff's cross motion for summary judgment is denied; defendant's motion for summary judgment is granted; and the petition is dismissed.

BY THE COURT

/s/ Philip Nichols Jr
Philip Nichols, Jr.
Judge, Presiding

[Nov. 25, 1977]